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IN THE COURT OF APPEALS OF INDIANA

VINCENT BOYD,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0508-CR-777
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Diane Moore, Magistrate
Cause No. 49G04-9901-CF-3515

June 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Vincent Boyd brings this belated appeal from his convictions for burglary,[1] a Class B felony, theft,[2] a Class D felony, and resisting law enforcement,[3] a Class A misdemeanor. Boyd raises two issues on appeal that we restate as:

I. Whether there was sufficient evidence to prove he committed residential burglary and theft.

II. Whether his sentence is appropriate.

We affirm.[4]

FACTS AND PROCEDURAL HISTORY

On December 23, 1998, a United States Postal Worker, Richard Puckett, was delivering mail in the Hampshire Court Apartments in Marion County, Indiana. Upon entering the 7990 building of those Apartments, Puckett "heard a loud noise similar to a horse kicking in a stall." *Tr.* at 44. Puckett then yelled, "'hey' and . . . heard some more noises, saw two people run north behind the apartment complex." *Id.* Puckett stepped outside and saw a third individual wearing a silver parka exit from the patio of a nearby apartment, jump a small fence, and enter a car with two other occupants. Puckett went to the rental office and called 911 giving dispatch a description of the vehicle.

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[1] *See* IC 35-43-2-1.

[2] *See* IC 35-43-4-2.

[3] *See* IC 35-44-3-3.

[4] The State has cross-appealed claiming:

I. This Court is without jurisdiction because Boyd was not entitled to a belated notice of appeal; and

II. Boyd's sentencing issue is barred by *res judicata*.

Because we resolve the substantive issues presented in favor of the State, we do not reach the procedural issues presented in the State's cross-appeal.

Shortly thereafter, Officer Christmas of the Rocky Ripple Police Department spotted a vehicle that matched the suspects' car traveling north on Michigan Road. Officer Christmas turned his vehicle around and saw the person in the back seat look back at him then turn around and brace himself, just before the vehicle increased speed. Officer Christmas pursued the vehicle onto 57th Street eastbound where it swerved and ran a vehicle off the road. At that time, Officer Christmas activated his lights, and notified dispatch of his pursuit. The vehicle continued for a couple of blocks then ran off the road. The two passenger suspects immediately fled in separate directions while the driver stayed in the vehicle. Officer Christmas shouted at the suspects to stop to no avail. He then approached the vehicle and apprehended the driver.

Marion County Sheriff's Deputy Vanessa Graham responded to Officer Christmas's dispatch. Upon arriving, she noticed Boyd hiding in the trees behind a house. Deputy Graham asked Boyd what he was doing. Boyd responded that he was "looking for the ride." *Tr.* at 77. Deputy Graham then returned Boyd to the suspects' vehicle where Sheriff's Detective Rex Thompson interviewed him. Detective Thompson informed Boyd of his rights and obtained a statement in which Boyd admitted to entering the 7990 building of Hampshire Court Apartments with the two other suspects, James Norwood and Ray Childs, to burglarize an apartment, and that he was not authorized to be there. Boyd also admitted that Norwood had lock picks with him and had bragged about a recent theft.

Authorities notified Mike Newberg, one of the occupants of Apartment "A" in the 7990 building of Hampshire Court Apartments, of the break-in. Newberg went to his

apartment to find it ransacked with several items missing. Thereafter, Newberg went to the suspects' vehicle where he identified his missing power tool.

The State charged Boyd with burglary, theft, and resisting law enforcement, and a jury found him guilty on all three counts. During sentencing, the trial court found that the aggravators of Boyd's criminal history, probationary status, three previous revocations of probation, and the need for correction rehabilitative treatment that can best be provided by commitment to a penal facility, outweighed the mitigator that Boyd's incarceration will pose an undue burden on his family. Boyd received the maximum twenty years for the Class B felony, burglary (the theft count was merged/vacated), with five years suspended, and one concurrent year for the Class A misdemeanor, resisting law enforcement.

Subsequently, Boyd, *pro se* and occasionally with counsel, initiated several motions to modify or correct what he claimed to be an erroneous sentence; all of which were denied. Further, Boyd moved for additional credit time and petitioned for a recalculation of his jail credit time, both of which were denied. In July of 2005, Boyd obtained counsel through the Appellate Division of the Marion County Public Defender Agency, and moved to file a belated notice of appeal. The trial court granted Boyd's motion. He now appeals.

DISCUSSION AND DECISION

I. Boyd's Appeal

A. Sufficiency of the Evidence

First, Boyd contends evidence was insufficient to support his conviction for

burglary and theft. Specifically, Boyd claims the state failed to prove beyond a reasonable doubt the *actus reas* embodied in the elements of: (1) "breaking and entering" for the burglary count; (2) exercise of unauthorized control of property with the intent to deprive the owner thereof for the theft count; and (3) knowledge and intention, or the *mens rea*, for both crimes.

When we review sufficiency of the evidence, we do not reweigh the evidence or assess the credibility of witness. *Davis v. State*, 835 N.E.2d 1102, 1111 (Ind. Ct. App. 2005) (citing *Hawkins v. State*, 794 N.E.2d 1158, 1164 (Ind.Ct.App.2003)). We consider only the probative evidence and reasonable inferences that support the jury's conclusion that the defendant is guilty beyond a reasonable doubt. *Id.* "It is well established that 'circumstantial evidence will be deemed sufficient if inferences may reasonably be drawn that enable the trier of fact to find the defendant guilty beyond a reasonable doubt.'" *Brink v. State*, 837 N.E.2d 192, 194 (Ind. Ct. App. 2005), *trans. denied* (quoting *Pratt v. State*, 744 N.E.2d 434, 436-437 (Ind. 2001)).

> Mere presence at the crime scene with the opportunity to commit a crime is not a sufficient basis on which to support a conviction. However, presence at the scene in connection with other circumstances tending to show participation, such as companionship with the one engaged in the crime, and the course of conduct of the defendant before, during, and after the offense, may raise a reasonable inference of guilt.

Id.

To convict for burglary the State must prove beyond a reasonable doubt that Boyd broke into and entered the dwelling of another with the intent to commit theft, or more precisely, with the intent to exert unauthorized control over, and deprive the owners of, their power tool, computer software, coins, and Kodak film. *Appellant's App.* at 43.

Defendant does not claim that there was no breaking and entering or no unauthorized exercise of control of property; Boyd argues that there is insufficient proof that *he* committed any of the aforementioned acts.

There is no distinction between the criminal responsibility of a principal and that of an accomplice. *McQueen v. State*, 1999, 711 N.E.2d 503, (Ind. Ct. App. 1998). "The individual who aids another person in committing a crime is as guilty as the actual perpetrator." *Vandivier v. State*, 822 N.E.2d 1047, 1054 (Ind. Ct. App. 2005), *trans. denied* (quoting *Turner v. State*, 755 N.E.2d 194, 198 (Ind. Ct. App. 2001), *trans. denied*.) In order to be convicted, an accomplice does not need participate in every element of the crime. *Vandivier v. State*, 822 N.E.2d at 1054. The Supreme Court has set forth four factors to consider in determining accomplice liability: (1) presence at the crime scene; (2) companionship with others engaged in criminal activity; (3) failure to oppose the crime; and (4) a defendant's conduct before, during, and after the occurrence of the crime. *Id.*

Although, Boyd claims there is no evidence he entered the apartment or that he had physical custody of any unauthorized property, the State was not charged with this burden. The State merely needed to prove beyond a reasonable doubt that Norwood entered the apartment to take another's property, which Boyd admitted, and that Boyd was an accomplice with Norwood. Boyd admits he was with Norwood when he broke into Apartment "A." He further admits that when he arrived at the 7990 apartment, he "pretty much picked up on it very fast" that they there to burglarize the apartment. Boyd admitted Norwood bragged to both him and Childs about a burglary two days before.

Exh. At 19-20, 20-21. No evidence by either the State or Boyd directly or implicitly suggests he ever opposed the crime.

Further, there was evidence presented that at least Norwood had unauthorized control of another's property with the intent to deprive the owner of the same – handling of the power tool at the stopped suspect's car. *See Tr.* at 70. *See Allen v. State*, 743 N.E.2d 1222, 1231 (Ind. Ct. App. 2003), *reh'g denied* (possession of stolen items within twenty-four hours of burglary may be sufficient to uphold theft and burglary conviction.)

The State still needed to prove Boyd's conduct was knowing and intentional. "Intent to commit a felony in a burglary case may be inferred from the circumstantial evidence of the nature of the crime." *Gentry v. State*, 835 N.E.2d 569, 573 (Ind. Ct. App. 2005). Intent may be inferred from the time, force, and manner of entry where there is no evidence of a lawful entry, but may not be inferred by mere evidence of breaking and entering. *Id.* Boyd's own admission that he knew he should not have been there and that he knew what they were there to do established his knowledge, and when coupled with his actions established his intent. All of this evidence plus Boyd's conduct before, during, and after the crime, i.e. his flight from Postman Puckett during the crime and Officer Christmas after, was sufficient for a reasonable trier of fact to conclude beyond a reasonable doubt that Boyd was an accomplice to the admitted burglary and theft; thus, affirming Boyd's convictions.

B. Propriety of Boyd's Sentence

Second, Boyd claims his sentence is inappropriate based on the nature of his offense and his character. Boyd contends that he should not have received the maximum

twenty years on the burglary charge because he is not the worst of the worst. *Buchanan v. State*, 767 N.E.2d 967, 973 (Ind. 2002). Boyd also claims that the trial court failed to relate all offenses in his criminal history to the instant offenses. Boyd asks us to exercise our authority under Indiana App. Rule 7(B) to expose these errors and revise his sentence based on the particulars of the offense and the character of the offender.

In order to sentence Boyd the trial court must have first considered the advisory (then presumptive)[5] sentence of the crime -- albeit ten years. *Rodriguez v. State*, 785 N.E.2d 1169, 1179 (Ind. Ct. App. 2003), *trans. denied* (citing *Hildebrandt v. State*, 770 N.E.2d 355, 361 (Ind. Ct. App. 2002), *trans. denied*.) In deviating from the presumptive sentence, the trial court was required to consider specific factors. The mandatory factors applicable here included: "(1) the risk of recidivism; (2) the nature and circumstances of the crime committed; (3) the defendant's prior criminal record, character, and condition; . . . and (7) any statement made by the victim of the crime." *Hildebrandt*, 770 N.E.2d at 362 (quoting IC 35-38-1-7.1 (Supp. 2002)).

In assessing the nature of the offense and the victim's statement, we speak no further than the trial court's synthesis of the circumstances before it:

> Counsel suggests that this was not a violent crime, and while it is designated a property crime, residential burglary is an incredibly intrusive event and the Court recalls the victim's testimony at trial as how it had disturbed him substantially.

Appellant's Br. at 16. In reviewing Boyd's criminal history and his risk of recidivism, we recognize the words of the trial court:

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[5] The sentencing statute in effect at the time (2000) of Boyd's sentence applies and not the current amended statute. *Weaver v. State* 845 N.E.2d 1066, 1070 (Ind. Ct. App. 2006), *trans. denied.* Under the current sentencing statute these factors are now advisory and not mandatory. *See* IC 35-38-1-7.1 (2006).

> Mr. Boyd has a substantial history of criminal delinquent activity, including a conviction on April 3, 1986 for burglary as a Class B felony; carrying a handgun without a license as a Class A misdemeanor on April 28, 1992; theft as a Class D felony on or about April 8, 1997; that he was on bond for a burglary offense at the time . . . this offense was committed [;] that further [he committed this offense] while he was on bond . . .[;] that [Boyd] was on probation or parole at the time of this offense . . .

In total, Boyd "has four prior misdemeanor convictions and two prior felony convictions." *Appellant's App.* at 133. Boyd also "has violated his Probation on two prior occasions." *Id.*

Boyd has failed to demonstrate that his sentence is inappropriate.

Affirmed.[6]

SULLIVAN, J., concurs.

ROBERTSON, Sr.J., dissents with separate opinion.

[6] In his dissent, our colleague, Senior Judge Robertson, states that he would dismiss this appeal because Boyd failed to demonstrate that his failure to file a timely appeal was not due to his fault and that he has been diligent in requesting permission to file a belated notice of appeal under Ind. Post-Conviction Rule 2(1). In electing to reach the merits of this appeal, we note that the State did not at any time before the trial court object to or oppose Boyd's Notice of Belated Appeal. It was not until Boyd had perfected his appeal before this Court that the State filed its motion to dismiss. Accordingly, we conclude that the State waived its right to object to the granting of Boyd's Motion. In reaching this conclusion, we are not unmindful of the fact that the trial court granted Boyd's motion without hearing three days after it was filed. While the shortness of time may have prevented the State from filing an objection before the trial court granted Boyd's motion, the State still had procedural avenues to raise its objection before the trial court, such as a motion to correct error, a motion for relief from judgment or order, and a motion to reconsider. "

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STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	
	)	

ROBERTSON, Senior Judge, dissenting.

I respectfully dissent from the majority opinion. I would dismiss the appeal based upon the State's cross-appeal issue that that the trial court is without jurisdiction because Boyd was not entitled to a belated notice of appeal.

Boyd was sentenced on 16 May 2000. He was advised of his appeal rights and he indicated that he intended to appeal. Boyd filed a timely praecipe for the record of the proceedings and then withdrew his motion. A direct appeal was not taken. Over a period of time, Boyd filed a series of motions to correct an erroneous sentence, all of which were denied. On 22 July 2005, Boyd filed a "Motion to File a Belated Notice of Appeal for the Record of Proceedings." Three days later the trial court granted that motion. No hearing was asked for or held by the trial court. On appeal, the State filed a motion to dismiss that addressed the matter of jurisdiction. It was considered and denied by the motions panel of this court.

Boyd's motion for a belated appeal contained the following information: that he was sentenced on or about 16 May 2000; that a public defender had been appointed; that more than

30 days had passed since he was sentenced; and, in order to represent Boyd on appeal the public defender needed a record of the proceedings.

Where the trial court does not hold a hearing before granting or denying a petition to file a belated notice of appeal, the only bases for that decision are the allegations contained in the motion to file a belated notice of appeal. *Hull v. State*, 839 N.E.2d 1250, 1253 (Ind. Ct. App. 2005). Because we are reviewing the same information that was available to the trial court, we owe no deference to its finding and review the grant of the motion *de novo.*

Boyd filed his motion pursuant to Ind. Post-Conviction Rule 2(1). That rule requires that where an eligible defendant fails to file a timely notice of appeal he must file a petition for a belated appeal. That petition must show a failure to file a timely notice of appeal was not due to the fault of the defendant and the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

A petitioner has the burden of proving by a preponderance of the evidence that he is entitled to the relief sought. *Townsend v. State*, 843 N.E.2d 972, 974 (Ind. Ct. App. 2006), *trans. denied.* Therefore, in a proper motion for a belated notice of appeal, Boyd must demonstrate he was diligent in pursuing the appeal. *Id.* Boyd's petition for a belated notice of appeal includes no facts related to the requirements of P-C. R. 2(1). There is no allegation that Boyd was without fault or that he was diligent in pursuing a belated appeal. Furthermore, Boyd did not submit evidence to support his petition, and without any evidence regarding the elements of the applicable rule, it cannot be said that Boyd met his burden of proof.

Accordingly, I would find that the trial court erred in granting Boyd's petition for permission to file a belated notice of appeal, and I would dismiss his appeal for lack of jurisdiction.

Additionally, I would hold that the motions panel of this court erred in denying the State's motion to dismiss for lack of jurisdiction because the trial court erred in granting the motion in the first instance. *See Davis v. State*, 771 N.E.2d 647, 649 n. 5 (Ind. 2002).